Supreme Court, U.S.
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No. 85

85-1013

In The

Supreme Court of the United States

October Term 1985

BARBARA RITTENHOUSE, Petitioner

v.

DEKALB COUNTY, GEORGIA and
C.L. Stewart, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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December, 1985

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QUESTION PRESENTED

WHETHER THE GEORGIA LAW OF SOVEREIGN IMMUNITY WHICH APPLIES TO BAR PETITIONER'S RIGHT TO RECOVER DAMAGES IN A NEGLIGENCE ACTION RENDERS HER STATE COURT REMEDY INADEQUATE UNDER PARRATT v. TAYLOR, 451 U.S. 527 (1981) AND THUS ENTITLES HER TO BRING A SECTION 1983 ACTION IN FEDERAL COURT?

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BARBARA RITTENHOUSE, Petitioner

v.

DEKALB COUNTY, GEORGIA and
C.L. STEWART, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Barbara Rittenhouse respectfully petitions this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered July 9, 1985. (A-4) This petition comes after the Eleventh Circuit denied Rittenhouse's petition for

rehearing and suggestio for rehearing en banc on September 10, 1985. (A-1) Coming within the 90 days allowed for the filing of petitions for certiorari under 28 U.S.C. §2101(c), this petition is timely filed.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is reported at 764 F.2d 1451.

JURISDICTION

Jurisdiction before the United States District Court for the Northern District of Georgia rested on 28 U.S.C. §§1331 and 1343(3). Jurisdiction in the United States Court of Appeals for the Eleventh Circuit was based on 28 U.S.C. §1291. Jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is conferred by 28 U.S.C. §1254(1).

STATUTES

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

O.C.G.A. §36-1-4:

> A county is not liable to suit for any cause of action unless made so by statute. (Civil Code 1895, §341; Civil Code 1910, §384; Code 1933, §23-1502.)

STATEMENT OF CASE

A. Facts and Proceedings in the District Court

This action arose from an automobile collision which occurred at approximately 8:00 a.m. on the morning of December 16, 1981. The site of the accident was within the city limits of Chamblee, Georgia which is in DeKalb County. Shortly after 9:00 p.m. on the evening of December 15, Mr. R.G. Shaheen, a resident of 3128 Shallowford Road, called the emergency number of the DeKalb County Water and Sewer Authority and advised the official answering the call of two facts: (1) a water meter in front of his house was leaking and causing water to run out into the street; and (2) there was a significant chance of a freeze that night. Nothing was done by the County Water and Sewer Authority in response to this call and Mr. Shaheen's fear about the overnight freeze proved to be tragically

accurate.

The next morning a car driven by Karen Bullard skidded out of control on the ice which had formed on the road surface in front of Mr. Shaheen's home. Mrs. Bullard's car crossed the center line and collided with a car driven by the petitioner, Barbara Rittenhouse. The petitioner received serious personal injuries and her car was destroyed. Mrs. Bullard and two of her sons were injured and her car was also destroyed. Mrs. Bullard's third son was killed.

The petitioner filed an action in federal district court based on 42 U.S.C. §1983 seeking damages for the losses she suffered as a result of this accident. She named as defendants: (1) DeKalb County, Georgia; (2) C.L. Stewart, Director of the DeKalb County Sewer and Water Authority; (3) the city of Chamblee, Georgia; and (4) Karen Bullard, the driver of the car which skidded out of control on the ice.

The petitioner's action was based on alternative theories of liability under section 1983. The first was that the accident and petitioner's injuries were the result of negligence, ultimately attributable to DeKalb County and C.L. Stewart for their failure to respond promptly to the Shaheen call giving notice of the broken water meter and advising about the possible overnight freeze. The second theory was premised ultimately on gross negligence or recklessness by DeKalb County and C.L. Stewart. Stewart in his capacity as Director of the County Sewer and Water Authority, had responsibility for the repair and maintenance of the county water system. According to this theory, the Authority's failure to develop and implement procedures to deal promptly with breakdowns in the water system lead directly to the icing condition that caused petitioner's injuries. In light of depositions taken in this case petitioner had evidence showing that the Authority fully

appreciated the driving hazards which might result from a broken water meter, particularly if freezing occurred; it also had actual knowledge of the particular dangerous condition in this case; and, finally, it possessed the means not only to repair the water meter promptly, but also to prevent or eliminate any icing.

Under both factual theories, Stewart's derelictions of duty served to trigger §1983 liability against DeKalb County under Monell v. Department of Social Services, 436 U.S. 658 (1978).

As the case evolved at the pleading stage, Karen Bullard and the city of Chamblee sought indemnification against DeKalb County and Stewart. Thus, they placed themselves in alignment with the petitioner despite nominally being defendants in the lawsuit. Thereafter, DeKalb County and Stewart filed a motion for summary judgment on the ground that Rittenhouse's claim was not cognizable under section 1983 and that, in any event, her claim was barred under Georgia law of sovereign immunity.

B. District Court's Order Granting Summary Judgment

As the trial judge viewed the case, the undisputed facts supported a claim for negligence at the most. The issue was "whether the discretionary decision of a repair crew, in an emergency situation, to answer a call to repair a broken water main instead of a leaking water meter, resulted in the deprivation of rights protected by the Fourteenth Amendment and thus [gave] rise to a section 1983 claim." (A-40, -41) The trial judge found against Rittenhouse. He reasoned that even if DeKalb County and Stewart had been negligent, they could not be held liable under section 1983 because: (1) "they acted in good faith;" (A-43) and (2) their action did not amount to an abuse of government power sufficient to raise "an ordinary tort by a government agent to the stature of a violation of the Constitution." (A-43)

Because of this disposition of the case, the trial obviously did not believe

that Rittenhouse had raised any serious factual allegations suggesting gross negligence or recklessness on the part of Stewart and DeKalb County. Nor did the trial judge address Rittenhouse's contention based on Parratt v. Taylor, 451 U.S. 527 (1981). Rittenhouse, however, had argued out that under Georgia law, sovereign immunity barred any recovery against both DeKalb County and Stewart. Under Parratt, the inadequacy or, to put it more accurately, the absence of a state remedy meant that she was entitled to have her personal injury claim considered in federal court under section 1983.

C. The Decision of the Eleventh Circuit Below

The Eleventh Circuit made two fundamental assumptions in its opinion affirming the grant of respondent's motion for summary judgment. The first was that under the rationale of Parratt v. Taylor, 451 U.S.

527 (1981) simple negligence can support a procedural due process claim under section 1983. Rittenhouse v. DeKalb County, 764 F.2d 1451, 1453 (11th Cir. 1985). The second assumption -- implicit in the court's analysis -- was that Parratt applied to liberty interests as well as property interests. The court determined that Parratt was applicable to the case and then turned to the question of whether petitioner had a right to pursue her claim in federal rather than state court. Id. at 1454.

Relying on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), petitioner argued first that the "established state procedure" exception to the Parratt doctrine was applicable and, for that reason, federal court was a proper forum for determination of her claim. The Eleventh Circuit rejected this argument because the emergency procedures of the County Water and Sewer Authority -- however deficient they might have been --

did not have the purpose of depriving anyone of protected liberty or property interests. Whatever the flaws in those procedures were, the court was convinced that any harm resulting from them was sufficiently random in its occurrence that pre-deprivation procedural safeguards were simply not feasible. This, of course, meant that the primary rule in Parratt controlled and the focus was therefore upon the adequacy of post-deprivation remedies under Georgia law. Rittenhouse v. DeKalb County, 764 F.2d at 1454-1457.

Here petitioner contended that her remedy for the injuries that she suffered was inadequate under Georgia law because of the doctrine of sovereign immunity. The doctrine applied to DeKalb County by virtue of O.C.G.A. §36-1-4 and to Stewart because he was a county officer sued in his official capacity for the consequences of a discretionary act or omission. Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980). All

parties before the Eleventh Circuit agreed that sovereign immunity would pose an absolute bar to monetary recovery by the petitioner.

Despite reading both Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194 (1984) as strongly implying that immunity might make a state remedy inadequate, the Eleventh Circuit rejected petitioner's contention and denied her access to a federal forum. The court noted that "[h]owever compelling these inferences [from Parratt and Hudson] may be, they are only inferences, and are overborne by the Court's holding in Martinez v. California, 444 U.S. 277 (1980)." Rittenhouse v. DeKalb County, 764 F.2d at 1457. Elaborating on the significance of Martinez, the Eleventh Circuit held that as long as the policy underlying a state law immunity was not arbitrary or irrational, the immunity could not be an unconstitutional denial of procedural due process. Id. at 1458. From

that premise, the court reasoned that a state immunity rule which is itself constitutional could not plausibly be viewed as rendering a state remedy inadequate under section 1983 for the purposes of the Parratt doctrine. Id. at 1458. In short, the court could perceive no basis for distinguishing sovereign immunity from any other claim or defense which might bar petitioner's recovery of damages. If the latter would not make petitioner's state remedy inadequate, then neither would a contention of sovereign immunity. Id. at 1459-1460.

REASONS FOR GRANTING WRIT OF CERTIORARI

This petition presents for consideration an issue that is of substantial importance in resolving uncertainty about the scope of Parratt v. Taylor, 451 U.S. 527 (1981). Countless situations can arise at the state or local level where the act or omission of a public official can be described as "taking" an individual's liberty or property. Rather than holding that such "takings" do not present a cognizable constitutional issue under section 1983, the Court in Parratt ruled that where randomly inflicted harms occur, there is no federal judicial remedy, at least for procedural due process claims, unless the litigant can demonstrate that state law remedies would be inadequate. The petitioner raises the issue of whether the Georgia sovereign immunity doctrine, which is applicable both to counties and to county officials in the exercise of discretionary authority, renders her state law remedy

for damages inadequate.

Two cases are presently before this Court which have a direct bearing on the question for which petitioner seeks review. Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984), cert. granted, ___ U.S. ___, 105 S. Ct. 1168 (1985); Davidson v. O'Lone, 752 F.2d 817 (3rd Cir. 1984), cert. granted, Davidson v. Cannon, ___ U.S. ___, 105 S. Ct. 2673 (1985).[1] Both cases involved suits by prisoners against prison or jail officials for personal injuries suffered while in custody. In both cases, an issue of state law immunity was raised. Both require this Court to discuss a number of key issues concerning the scope of the doctrine of Parratt v. Taylor, 451 U.S. 527 (1981).

In Davidson v. O'Lone, 752 F.2d 817 (3rd Cir. 1984), the Third Circuit rejected an attempted distinction under Parratt

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[1]These cases were orally argued on November 6, 1985.

based on differences between liberty and property interests. Id. at 821-22. It went on to hold that "mere negligence" by a state official is not actionable under section 1983. Id. at 822-829. At the same time, the court reaffirmed the principle that where the enfringement of a liberty interest has occurred, an action under section 1983 will lie for "intentional conduct, gross negligence or reckless indifference." In such a case, a section 1983 remedy would be available whether or not a post-deprivation remedy is available under state law. Id. at 828. Finally, the court examined the case from the standpoint of an alleged procedural due process violation. A New Jersey statute foreclosed the prisoner's personal injury claim in state court. Unlike the broad immunity bar confronting the present petitioner under Georgia law, the New Jersey statute dealt only with lawsuits filed by prisoners. Specifically, it barred suit against the

state or a prison employee for injuries suffered by one prisoner at the hands of another. Id. at 830. The Third Circuit concluded that New Jersey's narrowly crafted immunity for prison employees did not violate procedural due process. Like the Eleventh Circuit in petitioner's case below, the court relied specifically on Martinez v. California, 444 U.S. 277 (1980). Id.

In Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984) (en banc), the Fourth Circuit dealt with a section 1983 personal injury action by a prisoner against a deputy sheriff. Allegedly, the deputy left some material on a staircase causing the prisoner to trip and fall. Under its view of Parratt, the negligent conduct of a state official was actionable under the Due Process Clause of the Fourteenth Amendment, but only when property rather than liberty interests were involved. Id. at 230-232. This holding, of course, is in direct conflict with the Third Circuit's

ruling in Davidson on both points. As an alternative ground for decision, however, the court in Daniels went on to address the question raised by the operation of the Virginia doctrine of sovereign immunity. There, the Fourth Circuit expressed serious doubt about whether sovereign immunity would in fact bar the prisoner's attempt to recover since the deputy sheriff appeared to be performing ministerial as opposed to discretionary duties when he left the material on the staircase. For that reason, the court refused to decide whether the possible immunity of the deputy sheriff might require access to a federal forum for a section 1983 action. Id. 232.

Because of the similarity of the issues between the decision in Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985), and the two cases now pending before this Court, petitioner suggests that, at the least, her petition ought to be held pending rulings in Daniels v. Williams and Davidson

v. Cannon. For a grant of certiorari to be appropriate at a later time, the Court would have to hold in those cases that: (1) negligent conduct by a public official is actionable on procedural due process grounds; (2) such an action can be maintained in federal court under section 1983, regardless of whether the injury involved is to liberty or property interests, as long as there is no adequate remedy under state law; and (3) at least under some circumstances, an immunity shielding public officials from monetary liability can render a litigant's state court remedies inadequate.

If all of the preceding conditions come to pass, review of the present case would allow the Court to give additional clarification to the concept in Parratt of "inadequate state remedy." This would be desirable for two primary reasons. First, it is not at all clear how much the Court will be able to say about the state law immunity problem even if it were to reach the issue in Daniels

v. Williams and Davidson v. Cannon. There is apparently some dispute in Daniels about whether the defendant gets the benefit of sovereign immunity under Virginia law. In Davidson, the New Jersey immunity statute at issue is specific to the prison setting.[2] Thus, any comment in either case about the impact of immunity on state court remedies is going to be provisional at best and heavily influenced by considerations related to the prison environment.

Second, the petitioner's case presents the "inadequate state remedy" issue in a broader context. The Georgia law of sovereign immunity derives from common law sources, Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980). It provided absolute protection in this case to DeKalb County and to C.L.

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[2]Even if the New Jersey immunity withstands analysis under Parratt, it would not follow that all state law immunities, no matter how broad, are similarly valid.

Stewart. In effect, the doctrine reflects a policy to shift the entire burden of loss to the individual in all cases where negligence is alleged. The sole exception applies when the public employee is engaged in a ministerial rather than a discretionary function. This doctrine controls no matter how immense the harm to the individual and no matter what the particular employee's responsibilities are -- as long as the act or omission in question bears the discretionary function label. Given the breadth of the Georgia doctrine of sovereign immunity, it is clear that the doctrine collides directly with the Parratt requirement of an adequate state remedy. Petitioner offers a record that would enable the Court to elaborate more fully on this question than seems likely in either Daniels v. Williams or Davidson v. Cannon.

A fundamental question in cases diverted to the state courts under Parratt is the extent to which state immunities ought to mirror

those available in section 1983 actions that are not subject to diversion. Under federal immunity standards, few public officials -- mainly judges, prosecutors, and legislators -- receive the absolute immunity that appears to be widely conferred upon state and local officials under common law sovereign immunity principles. Absolute immunity in section 1983 cases, however, is closely linked to official function and, where it applies, it is premised on the belief that nothing less than complete immunity from suit would permit judges and prosecutors, for example, to do their jobs. Stump v. Sparkman, 435 U.S. 349 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976). Outside that limited class, the great majority of public officials are protected in section 1983 actions only by qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Do the considerations which sharply limit the availability of absolute immunity

in section 1983 cases not subject to the Parratt rule of diversion apply with the same force when negligent conduct is involved? It may well be that in some instances sovereign immunity fairly shifts to the victim the entire cost of negligent conduct by public officials. But petitioner contends that the premise of that doctrine ought to be examined carefully. This examination should encompass not only policy considerations intrinsic to section 1983 as a remedial statute but also the import of constitutional standards in closely related areas of the law. For example, in inverse condemnation cases, the loss shifting issue has come up in a number of section 1983 cases in recent years. Can state and local governments effectuate regulatory takings of property without being required to pay damages? Some

lower federal courts have said no to that question,[3] even though it might well suit the majority in a particular community to place the entire cost of regulation on a few individuals or perhaps on a single person. Likewise, under the Contract Clause, this Court has been highly skeptical of laws promoting the fiscal interests of the public at the expense of a small class of private citizens. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). Petitioner would suggest that the Parratt requirement of an adequate state remedy in those cases which it diverts to the state judiciary represents a similar check on

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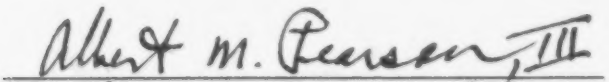
[3] See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank, 729 F.2d 402 (6th Cir. 1984); Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981) (Unit B). The Supreme Court has three times taken inverse condemnation cases presenting the question of the damages remedy, but has yet to decide it. Williamson County Regional Planning Commission v. Hamilton Bank, ___ U.S. ___, 105 S. Ct. 3108, 3116 (1985).

official power.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari on behalf of Barbara Rittenhouse.

Respectfully submitted,



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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, I hereby certify that on this 9th day of December, 1985, three copies of the enclosed Petition for Certiorari were mailed first-class, postage prepaid, to:

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I further certify that all parties required to be served have been served.

This 9th day of December, 1985.

Albert M. Pearson, III

Albert M. Pearson, III
Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8039

BARBARA RITTENHOUSE,

Plaintiff-Appellant,

versus

DeKALB COUNTY, et al.,

Defendants-Appellees,

KAREN BULLARD,

Defendant-Appellant.

Appeal from the United States
District Court for the Northern
District of Georgia

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion July 9, 1985, 11 Cir., 1985, ___ F.2d ___).

September 10, 1985

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in

favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge
*Honorable Virgil Pittman, U.S. District Judge, Southern District of Alabama, sitting by designation.

REHG-7
(Rev. 6/82)

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8039

D.C. Docket No. 82-1860

BARBARA RITTENHOUSE,

Plaintiff-Appellant,

versus

DEKALB COUNTY, ET AL.,

Defendants-Appellees,

KAREN BULLARD,

Defendant-Appellant.

Appeals from the United States
District Court of the Northern
District of Georgia

Before VANCE and ANDERSON, Circuit Judges,

and PITTMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District

of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant and defendant-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

PITTMAN, District Judge, sitting by designation, concurred specially and filed an opinion.

Entered: July 9, 1985

For the Court: Spencer D. Mercer,
Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: September 18, 1985

Barbara RITTENHOUSE,
Plaintiff-Appellant,

v.

DeKALB COUNTY, et al.,
Defendants-Appellees,

Karen Bullard, DefendantAppellant.

No. 84-8039.

United States Court of Appeals,
Eleventh Circuit

July 9, 1985

[764 F.2d 1451]

Appeals from the United States District Court for the Northern District of Georgia.

Before VANCE and ANDERSON, Circuit Judges, and PITTMAN*, Senior District Judge.

R. LANIER ANDERSON, III, Circuit Judge:

The Supreme Court held in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed.2d 420 (1981), that a prisoner's Fourteenth Amendment due process rights were

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*Honorable Virgil Pittman, U.S. District Judge, Southern District of Alabama, sitting by designation.

not violated when prison officials negligently lost his property, since the prisoner had an adequate remedy available under state law to redress the wrong. In this appeal, we must first address the contention that the Parratt analysis does not apply because of the "established state procedure" exception. We reject that argument, and then address the question of whether a state law remedy is inadequate under Paratt if principal defendants are immune from suit. We hold that the state law remedy is adequate, notwithstanding the immunity.

I. FACTS AND POSTURE

The incidents leading to this action occurred in the City of Chamblee, a municipal corporation in DeKalb County, Georgia. DeKalb County supplies water and sewer service to Chamblee. On December 15, 1981, at 9:18 p.m., a resident of Chamblee called the DeKalb County Water and Sewer Authority and reported that a water meter was leaking

and that the flow from the meter was running onto a nearby road. The caller warned that the temperature was expected to go below freezing that night, and that the leaking water might freeze on the road. DeKalb County did not repair the meter, water from the leak froze on the road, and a car skidded at the site early the next morning and collided with another car. The wreck caused extensive damage to the cars, inflected personal injury on several of the cars' occupants, and resulted in the tragic death of a son of one of the drivers.

Rittenhouse, driver of one of the cars, filed this §1933 action[1] in federal district court alleging that her Fourteenth Amendment rights had been violated by DeKalb County, by C.L. Stewart, director of the County's water and sewer authority, and by the City of Chamblee. Rittenhouse also

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[1] 42 U.S.C.A. §1983 (West 1981).

sought adjudication in federal court of her pendent state law negligence claim against Bullard, the driver of the car that had skidded out of control. DeKalb County and Stewart contended in their answer that the County and its officials enjoyed immunity from suit, that County officials had acted in good faith, and that there was no official policy, practice or custom that had led to the accident.[2]

The deposition testimony, when viewed most favorably to Rittenhouse, shows that DeKalb County raod crews were not notified of the leaking meter. If the crews had been properly dispatched, however, they could have repaired the meter and salted the road, notwithstanding the pendency of other repair calls. The depositions further

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[2]Bullard answered and filed cross-claims against DeKalb County, Stewart, and the City. The City answered and cross-claimed against DeKalb County and Stewart, and the latter two cross-claimed against the City. Both the City and Bullard seek indemnity against the County and Stewart, claiming that the

show that there is no common understanding among employees of the DeKalb County Water and Sewer Authority about how incoming repair calls are to be noted and referred to road crews for attention.

The district court granted DeKalb County and Stewart's motion for summary judgment on the grounds that "the allegations of tortious conduct . . . do not rise to constitutional proportions and are thus not cognizable in a section 1983 action." 575 F. Supp. 1173 (D. Ga. 1983). The district court was of the opinion that "the conduct of the local government complained of [must constitute] an abuse of power as a prerequisite to maintaining such an action." The court found that even if DeKalb County and Stewart had been negligent in failing to repair the leaking meter, they had acted

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acts or omissions of the County and Stewart were the ultimate cause of the deprivations at issue. The City of Chamblee, though nominally an appellee, takes the same position as appellants on the issues before us on appeal.

in good faith, with the result that their action was not a sufficient abuse of power to raise an ordinary tort to the level of a constitutional violation. In light of this ruling, the district court declined to entertain the pendent state claims, and found certain other pending motions to be moot. The district court thus dismissed all claims and entered final judgment, from which Rittenhouse and Bullard have appealed. The only issue on appeal is whether a valid §1983 claim has been stated against DeKalb County and Stewart.[3]

II. WHETHER THERE IS A VALID §1983 CLAIM: THE APPLICABILITY OF PARRATT

[1] We have no difficulty agreeing with the district court that defendants' conduct did not amount to an abuse of power

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[3] Appellant Bullard concedes that all other claims were properly dismissed, if the district court was correct in dismissing the §1983 claim. Brief of Karen Bullard at 9. Appellant Reittenhouse asserts on appeal only the §1983 issue. Thus, we need not address any other issue on appeal.

or other substantive constitutional violation. We are left then only with the contention that DeKalb County and Stewart deprived appellants of constitutionally protected rights without due process of law. Although appellants made this procedural due process claim to the district court, the district court did not explicitly address the claim. Apparently, the court assumed that a §1983 action could be maintained only if the conduct complained of were an abuse of power or a substantive constitutional violation. The Supreme Court made clear in Parratt, however, that merely negligent conduct can support a procedural due process claim if the state does not provide adequate post-deprivation remedies.

The conduct complained of in Parratt was the negligent loss by prison officials of a hobby kit a prisoner had ordered through the mail. The prisoner asserted that the prison officials had deprived him

of property without due process of law in violation of the Fourteenth Amendment. In considering the viability of a §1983 claim based on the officials' conduct, the Supreme Court observed that "[n]othing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights," 451 U.S. at 534, 101 S. Ct. at 1912, 68 L. Ed.2d at 427. The Court held that §1983 affords a remedy "without any express requirement of a particular state of mind." Id at 535, 101 S. Ct. at 1913, 68 L. Ed.2d at 428. The Court went on, however, and concluded that the state law remedies available to redress the prisoner's loss furnished him with all the process he was due under the Fourteenth Amendment, with the result that he failed to state a cause of action under §1983. Id. at 542-43, 101 S. Ct. at 1916-17, 68 L. Ed.2d at 433-34.

Although the main thrust of appellants' argument on appeal is that sovereign im-

munity deprives them of an adequate state remedy, a more basic ontention was mentioned in brief and pressed at oral argument, i.e., that the deprivations complained of were caused by the County's procedures, and that this case thus falls within the "established state procedure" exception described in Parratt so that the Parratt analysis concerning the adequacy of post-deprivation remedies is simply inapplicable. We turn first to this "established state procedure" argument.

A. The Established State Procedure Exception

The Supreme Court recognized in Parratt that in many cases process must be provided prior to deprivation of a constitutionally protected interest. 451 U.S. at 537-41, 101 S. Ct. at 1913-16. In Parratt, however, the deprivation of property was "random and unauthorized" and predeprivation process was impracticable. Id. at 541, 101 S. Ct. at 1916. Since predeprivation process was

not feasible, the Court held that the appropriate analysis for a procedural due process claim would focus on postdeprivation remedies. Thus, the Court assessed the postdeprivation tort claims procedures of the state, found them to be adequate, and concluded that the requirements of due process were satisfied. Id. at 543-44, 101 S. Ct. at 1916-17.

The "established state procedure" argument which appellants present finds its origin in dicta in the Parratt opinion, by which the Court distinguished that case from cases in which a deprivation has occurred as a result of some established state procedure. This distinction was the basis of the holding in Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed.2d 265 (1982). There, an employee's discrimination claim was dismissed because a state agency failed to convene a conference on the case within the period of time

that the state statute prescribed, and the state appellate court ruled that this deficiency was jurisdictional. The United States Supreme Court on direct appeal declined to apply Parratt, stating that the claimant was challenging "not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." Id. at 436, 102 S. Ct. at 1158.

We conclude, however, that the instant case does not fall within this "established state procedure" exception. It is apparent both from Parratt itself and from its progeny that the rationale for the exception is that predeprivation process is feasible where the deprivation occurs as a result of an established state procedure. The discussion in Parratt of the matter of "established state procedure" is in the context of the feasibility of predeprivation process. See 451 U.S. at 537, 101 S. Ct. at 1914 ("In

some cases this Court has held that due process requires a predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established state procedure and 'process' could be offered before any actual deprivation took place"); id. at 541, 101 S. Ct. at 1916 ("In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place"); id. at 543, 101 S. Ct. at 1917 ("There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing"). Also, the cases which Parratt cites as examples of the "established

state procedure" principle are all cases in which the established state procedure itself effected the deprivation, and pre-deprivation process was not only feasible, but was required. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (The Court struck down a New York statute that allowed a trust company, when it sought judicial settlement of its accounts, to give notice by publication; the Court required personal notice); Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed.2d 90 (1971) (requiring a personal hearing when a state statute provided for the taking of the driver's license of an uninsured motorist who had been involved in an accident); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed.2d 556 (1972) (holding that due process required a prior hearing before a state authorized its agents to seize property in a debtor's

possession).

Similarly in Logan, the state procedures that were challenged were themselves predeprivation procedures. Those procedures were tested against the requirements of procedural due process, and were found to be deficient. In Hudson v. Palmer, 468 U.S. ___, ___, 104 S. Ct. 3194, 3203, 82 L. Ed.2d 393, 407 (1984), the Supreme Court cited Logan as a reaffirmation of the Parratt holding, and explained the rationale of Parratt as follows: "We reasoned that where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure, the state cannot predict when the loss will occur." Id. at ___, 104 S. Ct. at 3203, 82 L. Ed.2d at 406. Thus, the Court concluded that under the Parratt analysis, "the controlling inquiry is solely whether the state is in a position to provide for predeprivation process." Id. at ___, 104 S. Ct. at 3204, 82

L. Ed.2d at 408.

In like manner, the cases following Parratt in the various circuit courts of appeal have deemed the feasibility of predeprivation procedures as the central question in determining the applicability of Parratt. Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984) ("The central question in determining the applicability of Parratt, therefore, is whether it is practicable for the state to provide a predeprivation hearing"); Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) ("the 'controlling question' in determining the applicability of Parratt is 'whether the State is in a position to provide for predeprivation process'" (quoting Hudson v. Palmer, 468 U.S. at ___, 104 S. Ct. at 3204, 82 L. Ed.2d at 408)) see also Collins v. King, 743 F.2d 248, 252 (5th Cir. 1984).

[2] On the basis of the foregoing authority, we conclude that the rationale un-

derlying the "established state procedure" exception is that where a deprivation occurs pursuant to an established state procedure, predeprivation process if ordinarily feasible. Because predeprivation process is not feasible in the instant case, we conclude that the "established state procedure" exception does not apply and that the Parratt analysis requires that we focus only on the adequacy of post-deprivation remedies.

[3] None of the parties in this case suggest that predeprivation process was feasible. There is no suggestion that the purpose of the challenged emergency procedures is to deprive anyone of anything, and the procedures cannot be said to contemplate the deprivation of any protected interest. At most, the deficient procedures might have been a contributing proximate cause of the accident, operating concurrently with other causes including the acts of

the drivers of the vehicles. Thus, this case is distinguishable both from the cases cited in Parratt as requiring predeprivation process, e.g., Mullane v. Central Hanover Trust Co., supra; Bell v. Burson, supra; and Fuentes v. Shevin, supra, and from the cases that have relied upon the "established state procedure" exception, e.g., Logan, supra; Augustine v. Doe, supra. In all of these cases, it was the state statutes or procedures themselves that effected a deprivation, and it is obvious that in each instance predeprivation process would have been feasible. It is apparent, however, that no predeprivation remedies could have been furnished Rittenhouse, because she became identified only upon the occurrence of the random accident in this case.[4]

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[4] In some case, it might be argued that emergency procedures are so egregiously deficient that deprivations of protected interests are manifestly predictable, so that the situation more nearly resembles the "established state procedure" cases in which the purpose and contem-

Thus, since predeprivation remedies were not feasible, the rationale of the "established

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plation of the state procedure involves deprivation of protected interests. In such a case, even though a particular plaintiff is not identified until the occurrence of the random contributing cause which accomplishes the deprivation, it might be argued that the governmental unit itself should have a duty sua sponte to correct the deficiencies, thus affording "predeprivation process." See Parratt, 451 U.S. at 546, 101 S. Ct. at 1918 (Blackmun, J., concurring) ("When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so."); Hudson v. Palmer, 468 U.S. at ___-___ n. 4, 104 S. Ct. at 3207-09 n. 4, 82 L. Ed.2d at 412-13 n. 4 (Stevens, J., joining the relevant part of the majority opinion on the understanding that it does not apply to cases "in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property."). We need not in this case decide whether due process places such an affirmative duty on a governmental unit. On the facts of this case, there could be no persuasive argument that the discretionary function here -- involving the need for and nature of emergency procedures in the water department -- was exercised by the County or Stewart in a manner so self-evidently deficient that deprivations were manifestly predictable, with the consequence that such predeprivation process would be feasible.

state procedure"[5] exception is not satisfied in this case. As a result, the Parratt analysis applies, and the state can satisfy

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[5]We distinguish "policy or custom" as the term was used in Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978), from the "established state procedure" that presents an exception to Parratt. In the first sense, the question is whether a municipality may be held vicariously liable in a case in which the actions of a subordinate employee are conceded to constitute a violation of plaintiff's constitutional rights. Monell held that liability in such a case cannot be based on a theory of respondeat superior, but will be found only if the employee acted pursuant to an official "policy or custom." Id. at 694, 98 S. Ct. at 2037. Thus, under Monell, the relevant inquiry concerns whether an employee's misconduct is sufficiently connected to a "policy or custom" to warrant imposition of liability at the governmental level. By contrast, "established state procedure" in Parratt refers to the mechanism that effects a deprivation or contributes to cause a deprivation. As the discussion in text suggests, the relevant inquiry in this context is whether predeprivation process is feasible; in other words, whether process is feasible before the "established state procedure" effects (or contributes to) the deprivation. The two concepts are sufficiently different to warrant recognition of this distinction. Cf. Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (Given that the "action pursuant to official municipal policy of some nature caused a constitutional tort," the court characterized Monell as a holding "simply concerned [with] whether a municipality itself could be held liable under such circumstances.").

due process by providing adequate postdeprivation remedies.

Our conclusion in this case is reinforced by the recognition that a contrary holding would sap Parratt of all of its vitality. In Parratt, and in any similar case, a reasonable argument could be made that better procedures would have prevented the deprivation. Appellant's argument in this case is nothing more than a contention that better procedures would have prevented the accident. If such a contention were sufficient to invoke the "established state procedure" exception and remove a case from Parratt, few instances would remain in which Parratt might apply. We do not believe, therefore, that the Supreme Court intended general allegations of administrative negligence to render the Parratt analysis inapplicable.[6] Cf. Rizzo v. Goode,

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[6] But cf. Marshall v. Norwood, 741 F.2d 761, 763 (5th Cir. 1984) (in dicta, the court observed that

423 U.S. 362, 96 S. Ct. 598, 46 L. Ed.2d 561 (1976); Hull v. City of Ducanville, 678 F.2d 582 (5th Cir. 1982).

We conclude that predeprivation process was not feasible in this case, and thus that the "established state procedure" exception does not apply. Rittenhouse therefore must make out her §1983 claim, if at all, pursuant to a Parratt assessment of the postdeprivation remedies available to her. More particularly, the viability of her §1983 action depends on whether her postdeprivation remedies are adequate to

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an established state procedure that recklessly disregards prisoners' property during searches would support a cognizable Fourteenth Amendment claim); Pantoja v. City of Gonzales, 538 F. Supp. 335, 338 (N.D. Cal. 1982) (inadequate training of police officers is included among the "established state procedures" that make Parratt inapplicable). The situations presented in these cases, however, may have approached the egregiously deficient procedure discussed in note 4, supra, and thus involved the issue left open there of whether due process imposes on governmental units some affirmative duty to remedy procedures which are self-evidently and egregiously risk producing.

satisfy due process. We turn, therefore, to consider whether, in light of Georgia's immunity rules, Rittenhouse has an adequate postdeprivation remedy under state law.

B. The Effect of Immunity on the Adequacy of State Law Remedies

DeKalb County is immune from suit for negligence under Georgia law. Ga. Code Ann. §36-1-4 (Michie 1982); see also Ga. Const. Art. I, §2, ¶9; Miree v. United States, 242 Ga. 126, 249 S.E.2d 573 (1978). Although the immunity a county officer enjoys apparently is not as absolute, the parties agree before this court that Stewart, as director of the County's water and sewer authority, is immune from suit for the negligence Rittenhouse has alleged. See Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980). These state law immunities call into question whether Rittenhouse has an adequate state remedy and hence whether under Parratt a §1983 action is

cognizable in the first instance.[7]

We face apparently conflicting indications in Supreme Court authority as to whether state law immunity renders a state remedy inadequate. In Parratt, the Court noted that Nebraska furnished a tort claims procedure that satisfied the requirements of due process. 451 U.S. at 544, 101 S.

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[7] If the state remedy were inadequate and a §1983 action could be maintained, the question would remain whether the County or Stewart were immune under §1983 jurisprudence. The Supreme Court has held that Congress did not intend to abolish common law immunities when it enacted §1983. Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L. Ed.2d 288 (1967); Procunier v. Navarette, 434 U.S. 555, 561, 98 S. Ct. 855, 859, 55 L. Ed.2d 24 (1978). Generally, immunities have been retained if they were well established at common law at the time §1983 was enacted and if their rationale were compatible with the purposes of the Civil Rights Act. Owen v. City of Independence, 445 U.S. 622, 638, 100 S. Ct. 1398, 1409, 63 L. Ed.2d 673 (1980). Once a viable §1983 action has been established, however, state immunity rules will not sheild defendants from liability. Id. at 647 n. 30, 100 S. Ct. at 1413 n. 30; Martinez v. California, 444 U.S. 277, 284 n. 8, 100 S. Ct. 553, 538 n. 8, 62 L. Ed.2d 481 (1980); see also Monell v. Department of Social Services, 436 U.S. 658, 695 n. 59, 701, 98 S. Ct. 2018, 2038 n. 59, 2041 56 L. Ed.2d 611 (1978).

Ct. at 1917. One might infer from this that in the absence of a remedy in fact, the Court would have considered the Nebraska procedures inadequate.[8] Such an inference is strongly supported by the recent case of Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 82 L. Ed.2d 393 (1984), in which the Court found the state remedies to be adequate only after establishing that applicable state law did not afford immunity. Id. at ___ & n. 15, 104 S. Ct. at 3205 & n. 15, 82 L. Ed.2d at 409 & n. 15. See also Thibodeaux v. Bordelon, 740 F.2d 329, 339 & n. 10 (5th Cir. 1984); Williams v. Morris, 697 F.2d 1349, 1351 & n. 5 (10th Cir. 1982).

[4] However compelling these inferences may be, they are only inferences, and

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[8] Justice Powell reached this conclusion in his separate opinion in Parratt. "If . . . immunity has the effect of cutting off all state-law remedies, under the Court's reasoning there appears to be a deprivation of procedural due process, actionable in federal court." 451 U.S. at 551 n. 9, 101 S. Ct. at 1921 n. 9 (Powell, J., concurring in the result).

are overborne in our view by the Court's holding in Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed.2d 481 (1980). In Martinez, the survivors of a girl killed by a parolee sought damages under state law from parole officials who had decided to release the parolee. A California statute insulated public entities and employees from liability for parole decisions. Id. at 280, 100 S. Ct. at 556. The Court upheld the immunity statute against the contention that it deprived the plaintiffs of their wrongful death action without due process of law.

> [E]ven if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
>
> . . . We therefore find no merit in the contention that the State's immunity statute is unconstitutional when ap-

> plied to defeat a tort claim arising under state law.

Id. at 282-83, 100 S. Ct. at 557-58. We read Martinez as establishing that a state does not deny procedural due process simply by granting reasonable tort immunity to state entitles and officials.

Martinez indicates that a state law immunity scheme could conceivably result in "state action that is wholly arbitrary or irrational" and which thus violates the Fourteenth Amendment. We can readily conclude, however, that the immunity DeKalb County and Stewart enjoy under Georgia law is not arbitrary and irrational so as to implicate procedural due process concerns. The immunity in question shields the County and its officials from liability for a purely discretionary function involving the necessity for and nature of procedures for handling emergency matters in the water department. Such traditional governmental immunity is in no sense "ar-

bitrary or irrational" and consequently, under Martinez, the Georgia immunity rules do not in themselves deny procedural due process.

[5] We can discern no meaningful distinction between the conclusion in Martinez that immunity rules do not in themselves deny due process, and our conclusion here that they do not deny due process by virtue of making state remedies inadequate under Parratt. The constitutional question in either view is whether the state procedures, in light of the immunity, provide the process required under the Fourteenth Amendment. See Parratt v. Taylor, 451 U.S. at 537, 101 S. Ct. at 1914. The Supreme Court decided in Martinez that they do. 444 U.S. 282-83, 100 S. Ct. at 557-58.[9]

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[9]The Supreme Court was presented with two claims in Martinez -- the Fourteenth Amendment challenge already discussed, which concerned the viability of a state law wrongful death action in the face of an immunity statute, and a separate §1983 claim under federal law against the

Martinez was decided before Parratt, and it might be argued that Parratt and Hudson implicitly modify its holding on immunity. We find a direct indication to the contrary, however, in Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed.2d 265 (1982). As discussed in Part II.A., supra, the Court in Logan did not assess the adequacy of postdeprivation state remedies because the plaintiff had been deprived of his cause of action through the state's own procedural rules, a feature that distinguished the case from Parratt and made any postdeprivation remedy unavailing for due process purposes. Id. at 435-36,

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state parole officials. The Court disposed of the §1983 claim on the ground that the parolee's action in committing the murder was "too remote a consequence of the parole officer's action to hold them responsible under the federal civil rights law." 444 U.S. at 285, 100 S. Ct. at 559. Thus the Court was not presented with the question, later decided in Parratt, of whether a plaintiff may be relegated to remedies under state law if those remedies are constitutionally adequate.

102 S. Ct. at 1157-58. In concluding, however, that the state's procedural bar was unconstitutional, the Court emphasized that "the State remains free to create substantive defenses or immunities for use in adjudication." Id. at 432, 102 S. Ct. at 1156. This dicta from Logan is some indication that when the Supreme Court decided Parratt, it did not intend to abrogate state immunity rules on due process grounds. Even without this indication, however, we would be reluctant to conclude that the Supreme Court had departed from Martinez and displaced a prominent and longstanding feature of state tort law without a holding expressly directed to the question.

The only circuit court of appeals case we have found on point reaches the same conclusion we reach with respect to state law immunity. In Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), the court was unable to predict whether sovereign immunity

would shield a deputy sheriff from liability and therefore addressed the question whether the availability of immunity would render the state remedy inadequate under Parratt. The court could find no basis for distinguishing sovereign immunity from other affirmative defenses, and concluded that the plaintiff's opportunity to adjudicate the question was an "adequate remedy" under Parratt even assuming that an immunity defense would defeat the claim. Id. at 797-99.

CONCLUSION

We conclude that the "established state procedure" exception does not apply, and therefore that the Parratt analysis is applicable. We further conclude that the sovereign immunity enjoyed by DeKalb County and Stewart do not render appellant's state law remedy inadequate under Parratt. Consequently, appellant was not deprived of

her rights without due process of law. As a result, she has not stated an actionable claim under §1983 and the district court did not err in granting summary judgment. The judgment of the district court is

AFFIRMED.

PITTMAN, District Judge, specially concurring:

I concur in the conclusion reached by the court. The action brought by the appellants in this case amounts to nothing more than a tort suit against the county. The fact that the allegedly tortious conduct was committed by state officials acting under color of law does not make the appellants' injury a violation of the fourteenth amendment actionable under §1983. The Supreme Court in Parratt v. Taylor, 451 U.S. 527, 544, 101 S. Ct. 1908, 1917, 68 L. Ed.2d 420 (1981), warned against making the fourteenth amendment "a font of tort law." Id. at 544, 101 S. Ct. at 1917

(quoting Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed.2d 405 (1976)). Under the rationale advanced by the plaintiff in Parratt, the Court stated, "[A]ny party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under §1983." Parratt, 451 U.S. at 544, 101 S. Ct. at 1917. The case at bar is just such a case: the plaintiffs allege a constitutional deprivation merely on the grounds that county official negligently caused an automobile accident in which the plaintiffs were injured. The Supreme Court stated in Parratt that "[w]e do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." Id.

Justice Stewart in a concurrence stated that tortious conduct of the kind alleged by the plaintiff in this case is not the type of conduct that the Constitution sought to

prohibit. See id., at 544-45, 101 S. Ct. at 1917-18 (Stewart, J., concurring.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BARBARA RITTENHOUSE	:	
	:	
vs.	:	
	:	
DEKALB COUNTY; CITY OF CHAMBLEE; C.L. STEWART, Individually and in his Capacity as Director of the DeKalb County Water and Sewer Department; and KAREN BULLARD	:	C82-1860A

ORDER

In an order of August 12, 1983, this court directed the parties to submit briefs on the question of whether the plaintiff's complaint and defendant Bullard's cross-claims present actionable claims under 42 U.S.C. §1983. The court deferred consideration of the motion for summary judgment by defendants DeKalb County (DeKalb) and C.L. Stewart until it determined whether a section 1983 claim is presented by these parties. The court also expressed concern

about the basis for its jurisdiction over defendant Bullard. In response, defendant Bullard has moved for a dismissal of the action against her and for realignment as a plaintiff in this action.

Plaintiff and defendant Bullard seek to hold DeKalb, Stewart, and the City of Chamblee liable in a section 1983 action for personal injury, general property damage, and loss of life which occurred as a result of an automobile accident involving Rittenhouse and Bullard in December 1981. Plaintiff and defendant Bullard argue that DeKalb, Stewart, and Chamblee are liable because they allowed water which leaked from a residential water meter to accumulate and freeze on the road, thereby causing Bullard to lose control of her automobile, which collided with the plaintiff's automobile.

Defendants DeKalb and Stewart argue that the only issue in this case is whether

the discretionary decision of a repair crew, in an emergency situation, to answer a call to repair a broken water main instead of repairing a leaking water meter, resulted in the deprivation of rights protected by the Fourteenth Amendment and thus gives rise to a section 1983 claim. They content that this action by the county and its employees does not present a claim of constitutional magnitude and is not cognizable under section 1983.

Plaintiff Rittenhouse, defendant Chamblee, and defendant Bullard oppose the motion for summary judgment. They contend that the actions of DeKalb and Stewart are sufficient to be considered constitutional deprivations under section 1983. They maintain that section 1983 affords a civil remedy for the deprivation of federally protected rights by defendants DeKalb and Stewart without any express requirement of a particular state of mind. They also

argue that because Georgia law provides sovereign immunity for counties, no state forum is available to redress the losses suffered by Rittenhouse and Bullard. This result, they assert, mandates recognition by this court of the parties' claims in a section 1983 action.

The court finds that the allegations of tortious conduct against DeKalb and Stewart do not rise to constitutional proportions and are thus not cognizable in a section 1983 action. The case law indicates that the claimants must establish that the conduct of the local government complained of constitutes an abuse of power as a prerequisite to maintaining such an action. See e.g. York v. City of Cedartown, 648 F.2d 231 (5th Cir. 1981) (Unit B); Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1981); Williams v. Kelley, 624 F.2d 695 (5th Cir. 1980). A section 1983 action does not arise "merely because tortious in-

jury results from action or inaction by state officers or employees." Hull, 678 F.2d at 584. Assuming, as the plaintiff alleges, that DeKalb and Stewart were negligent in failing to repair the leaking water meter, the court finds they acted in good faith, and given the facts of this case, their action does not constitute "an abuse of governmental power sufficient to raise an ordinary tort by a government agent to the stature of a violation of the Constitution." Williams, 624 F.2d at 697; see also Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1331-32 (11th Cir. 1982) (Hoffman, J., concurring specially); York, 648 F.2d 231 (5th Cir. 1981); Cf. Jackson v. City of Joliet, 52 U.S.L.W. 2133 (7th Cir. August 23, 1983).

The court will not expand the range of section 1983 actions to permit suits based on the type of negligence claims alleged in this case. See Parratt v. Taylor, 451 U.S. 527, 544, 101 S. Ct. 1908, 1917 (1981).

DeKalb and Stewart will be granted summary judgment on the section 1983 claims asserted against them. All remaining section 1983 claims will be dismissed.

The only other claims raised in the pleadings are based on state law. The court on its own motion raises the question of whether it has subject matter jurisdiction over these claims. Rule 12(h)(3), Fed. R. Civ. P.; see Sumner v. Mata, 102 U.S. Ct. 1303 (1982). It appears from the pleadings that this court may hear the state law claims only through the exercise of pendent jurisdiction. The pleadings also indicate that an action presenting the same issues sought to be litigated in this court has been filed in state court. The court declines in its discretion to exercise pendent jurisdiction over the parties' state law claims, and will, on its own motion, dismiss the state law claims.

Defendant Bullard has moved for dismissal of all claims against her and for realignment as a plaintiff in this action. Because the ruling above will terminate this action in its entirety, Bullard's motions are moot.

Plaintiff has moved for leave to amend her complaint by adding four additional employees of DeKalb County as defendants in this action. Under the above analysis the proposed amended complaint would still fail to state a cause of action under section 1983. The motion for leave to amend the complaint will be denied.

Accordingly, the motion of DeKalb and Stewart for summary judgment on the section 1983 claims is GRANTED. All other section 1983 claims are DISMISSED. Plaintiff's motion for leave to amend the complaint is DENIED. All state law claims are DISMISSED on the motion of the court.

SO ORDERED, this 9th day of December, 1983.

/s/
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	NORTHERN DISTRICT OF GEORGIA
BARBARA RITTENHOUSE	C82-1860A
v.	JUDGE RICHARD C. FREEMAN
DEKALB COUNTY, CITY OF CHAMBLEE, et al.	

/ / Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

/X/ Decision by Court. This action came for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

IT IS ORDERED AND ADJUDGED that plaintiff BARBARA RITTENHOUSE take nothing, that the action be dismissed on the merits, and that defendants DEKALB COUNTY, CITY OF CHAMBLEE, C.L. STEWART, Individually and Officially in his Capacity as Director of the DeKalb County Water and Sewer Department,

and KAREN BULLARD recover of plaintiff their costs of this action.

FILED & ENTERED IN CLERK'S OFFICE
This 12th day of December, 1983
BEN H. CARTER, Clerk

By: /s/
Deputy Clerk